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Gender and the Voir Dire Process

by

Tasha Ann Lane

A thesis submitted in partial fulfillment of the
requirements for the degree of

Master of Science
in
Sociology

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Portland State University
2019

Abstract

The jury selection process (also known as voir dire) has been examined previously in many ways, including racial impacts. Previous research suggests the need for more examination of how and if gender impacts the voir dire process. The lack of knowledge about how gender impacts voir dire might also have implications for public respect and trust in the court system. For example, theories of procedural justice suggest that individual experiences with the legal system affect whether they view the entire legal system as being legitimate. This is important because this perception then impacts how the public interact with the system. This research examines one main research question, how is gender salient in the voir dire process? To understand how gender impacts voir dire, including how attorneys and potential jurors communicate with each other, courtroom observations of the voir dire process were conducted. During these observations coding sheets were used focusing on types of questions asked by attorneys and reactions of the potential jurors and how gender affected this process. Over 150 interactions with potential jurors were examined. The results of these interactions focus on the use and misuse of gendered titles, gendered expectations, and repetition. It was found that gender is salient throughout the process and may impact how attorneys present the questions they ask and the information they give. The results of this research are applicable to jury selection/voir dire research and are important to better understanding how gender is seen and acted out in the courtroom.

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Chapter 1: Introduction

Many citizens are called for jury duty at some point, or at least know that they can be if they qualify. Jury selection and voir dire may be an individual's first experience with the legal system itself and therefore greatly impact how they view the criminal justice system moving forward. Jury selection is a crucial part of any criminal trial as these are the people who will determine if the defendant is guilty or not guilty. Plea deals are the main ways in which criminal convictions are resolved, with at least 90% of defendants pleading guilty over going to trial (Criminal Cases, UScourts.gov 2019). Juries are also used in civil trials where they will determine awards such as damages. Civil juries do not have to find proof beyond a reasonable doubt as criminal juries do. I chose to focus on voir dire in criminal trials because these jurors would (if chosen for the jury) be deciding on criminal guilt and these were the voir dices that were more prevalent in the court houses I used as my research sites. Due to responsibilities of a jury, it is necessary that we understand what happens in the jury selection process and that it is living up to what it is supposed to be, the selection of a group of unbiased individuals who represent a jury of the defendant's peers.

It is important to note that research on gender in the courtroom specifically dealing with juries is consistently older; newer research on gender in the courtroom focuses on the gender of attorneys, judges, and defendants but not their intersection with jurors. Searches of several sociological and social science databases returned few recent academic publications using the search terms "gender" and "voir dire". Balch et al. (1976) argues that voir dire socializes an individual to the legal system and acts as an individual's crash course in the law. This shows the importance of understanding how

this process treats potential jurors. Further, given how dated much of the research on gender and voir dire is, this also points to the importance of understanding this relationship in the current era.

Past studies have examined the impact of race in jury selection whether that be the use of peremptory strikes or who is selected for certain kinds of trials (King, 1994; Turner & Lovell, 1986). Not a lot of research has been done on whether gender brings similar or different impacts on the jury selection process. Previous research has examined juror's own perceptions of gender and jury selection (Eigenberg et al., 2012) but has not examined the interaction between attorney/judges and jurors during the voir dire process. Therefore, to better understand gender and the jury selection process, this study aims to examine the interactions between attorneys/judges and potential jurors within the voir dire process itself.

Gender has a history of influencing the court system with prosecutors thinking that male and female jurors are likely to acquit a defendant differently in different cases (Mahoney, 1987). Females are perceived to be more likely to acquit due to emotion and are preferred by prosecutors in cases that involve rape or children (Mahoney, 1987). Due to the need to better understand the jury selection process as well as how gender interacts with this process, this research aims to address *how is gender salient in the voir dire process?* This aims to understand how gender is observable and if it impacts the way individuals communicate or behave during the process.

Jurors' perception of legitimacy of the legal system impacts the decisions they make as a juror (Farrell et al., 2012). Farrell et al's (2012) findings highlight that previous perceptions of the justice system not only create outside bias but also can help decided

which side of the case an individual is more likely to fall. This continues to stress the importance of understanding how perceptions are influenced as they have a continuing impact on how the system works. Race is often a factor in how individuals view the legal system due to different experiences in the legal system based on the individuals race; African-Americans reported higher levels of perceived bias in regard to all areas of the legal system than whites (Bobo and Thompson, 2006). These beliefs are likely to influence who they believe in trials if they were to be a juror (Bobo and Thompson, 2006). Due to this, the legitimacy of race-based jury selection has been questioned and brought up as discrimination in legal cases (*Batson v. Kentucky*, 1986). Gender was then added to this discussion in the *J.E.B. v. Alabama* (1994) Supreme Court case, that ruled gender based peremptory strikes also applied to the findings of *Batson*.

Other researchers have also identified the importance of further study into how gender impacts voir dire. This is seen when Eigenberg et al. (2012) state “More research is needed on gender and its relationship to the jury selection process. The paucity of work in this area makes it difficult to predict the impact gender has on this process and how it might affect more general views, including whether the system itself is viewed as fair” (Eigenberg et al., 2012: 261). With this recommendation in mind, this study’s main research question is *how is gender salient throughout the voir dire process?* This research will discuss the findings that gender within the voir dire process is present through the use of potential juror’s marital titles, it is discussed through attorney’s reaction to gender expectation and it impacts gendered attorney presentation style through their differing use of repetition of questions and responses for male and female potential jurors, These questions are examined through observations of the voir dire process in two counties.

This research continues on from where previous literature ends. Race has been examined in the voir dire process but relatively little recent work has looked at the presence of gender. This is an important issue to study because it may impact how potential jurors view the legal system in the future. It is also an important research topic because the results found show how gender may impact the criminal justice system as a whole and how the institution of law functions.

Chapter 2: Theoretical Framework

When analyzing the saliency of gender in the voir dire process, we first need to understand how gender and behavior are discussed theoretically. Gender is not just a characteristic of an individual but a process that impacts how we act and how others perceive us (West and Zimmerman, 1987). To highlight this, West and Zimmerman (1987) discuss that gender is a part of social situations in that it creates responses and is used as a reason to organize parts of society, additionally it legitimizes these societal divisions (West and Zimmerman, 1987: 126). This suggests that the process of gender should be considered an achieved status, gendered expectations are based on the behaviors of gender and not sex of the individual.

Another major aspect of West and Zimmerman's (1987) "doing gender" theory is accountability. They state that there is accountability to sex categories. In other words, when doing any form of behavior or activity in society we do so while being held accountable to a specific sex category. Therefore, things are classed as more woman-like or male-like, our behavior is then judged by others more positively or negatively when it falls in or outside of these categories respectively (West and Zimmerman, 1987). Doing gender also leads to what West and Zimmerman refer to as assessments. West and Zimmerman (1987) state "to 'do' gender is not always to live up to normative conceptions of femininity or masculinity; it is to engage in behavior at the risk of gender assessment" (West and Zimmerman, 1987: 136) which highlights both points of this argument, that there are categories individuals are judged by and all behavior is viewed through a gendered lense. These levels of accountability show how gender fits into the wider societal structure and is a construction of how we behave rather than an innate

characteristic. Within this it is then important to consider the ways in which this gender structure is used in many different environments. How individuals rely on gender structure to organize or guide their behavior based on the reactions they then expect to receive could lead to broad assumptions or stereotypes of how a man or woman should behave.

West and Zimmerman (1987) argue that gender is a process that is embedded in everyday life and therefore is present in the voir dire process. They argue that gender is more than single characteristics but a process that influences all interactions and in turn reproduces the believed social meanings. West and Zimmerman (1987) claim that when doing activities, we do so at the risk of being assessed based on our gender, assigned a gender and then judged based on how a male or female is supposed to accomplish the task. If the process of gender is apparent in social situations then it is also necessary to consider that it is prevalent in societal structures. With gendered expectations and accountability we see that there are ways in which gender is considered and analyzed within structures. This theoretical argument is applicable to voir dire and how potential jurors, attorneys, and judges each do their own gender. For example, do female or male attorneys act differently when questioning potential jurors and do jurors respond differently to questions based on their gender? Following the ideas of West and Zimmerman (1987), how each individual within the jury selection process does their gender will impact the overall process itself because gender is produced in all interactions. Eigenberg et al. (2012) state that “Thus, assessing the fairness of the justice system is related to the ways judges, jurors, and other court actors ‘do gender’” (Eigenberg et al., 2012: 272). Therefore, using West and Zimmerman’s theory of doing

gender will greater allow this research to not only examine how gender is salient in voir dire through what questions are asked of different genders but will also allow us to better explain these situations and what is potentially behind different behaviors for different genders.

Procedural Justice

The way juries are conducted can have a wider effect on the potential juror's overall view of the legal system. Procedural justice theory argues that the procedures used to reach a decision greatly influence an individual's judgement of fairness (Thibaut & Walker, 1975). Further studies argue that this is applicable to the entire legal system perceptions of fairness determine individuals' reactions to legal authorities are based off of how they view the fairness of the processes authorities use to make decisions as well as how they treat the public (Tyler, 2003: 284). Tyler (2003) goes on to argue that people are more likely to comply with the law if they believe they are being treated fairly: "police and courts can facilitate acceptance by engaging in strategies of process based regulation – treating community residents in ways that lead them to feel that the police and courts exercise authority in fair ways" (Tyler, 2003: 286). Individuals view the legal system through the procedures and processes within it and they judge the legitimacy of the whole based on the fairness of the parts. From this wider view of legitimacy, procedural justice is also applicable on a smaller, individual scale. Tyler argues that procedural justice is applicable not only to the public in making general evaluations but also to individual experiences within the system (Tyler, 2003). Tyler (2003) discusses this in reference to experiences specifically with police officers and judges, but any other form of authority in the legal system fits with the definition, such as attorneys. Within

this individualized aspect it is also a cyclical process for the person. Spiraling effect, where each experience with a legal authority influencing individual views on systematic legitimacy and therefore continued cooperation. If the individual does not view the procedure as legitimate due to their personal interaction with it, then the use of force or new regulations is often needed to continue the process, this continues to delegitimize the procedure as fewer people will view it as fair (Tyler, 2003). If individuals view that they, their fellow jurors, and the defendant are being treated fairly during voir dire and approve more of their experience, then they are more likely to view the overall legal system as more legitimate. Hans (1986) suggests that procedural justice supports the notion that adversarial procedures should be used in voir dire because they are viewed as more fair by potential jurors. This highlights that procedural justice can connect voir dire to overall views of the legal system. Procedural justice shows that when individuals experience voir dire they are being a part of a singular part of the legal system process. Within voir dire they are exposed to attorneys and judges as authority figures and witness their processes and experience how they treat members of the public when they communicate with potential jurors. When applying procedural justice theory these experiences in voir dire are then applied to the broader legal system. The view of how legitimate voir dire was and how well or poorly potential jurors were treated by authority influences how legitimate they may perceive the legal system to be. This could then impact how they vote, how they react to laws, and how they would act as a juror if selected.

Chapter 3: Literature Review

Voir dire in general

Previous literature focuses on the role of voir dire for potential jurors and how voir dire questions impact a juror's view of the case they may serve on. For example, if they are asked a question about the meaning of loitering, they may assume that the case relies heavily on this definition. Balch et al. (1976) argue that voir dire acts as a socialization period to the criminal justice system for jurors. The first part of this socialization process is being in the courtroom, which is different than most juror's everyday surroundings. The jurors are placed in a courtroom and are shown the jury box, reinforcing their role and what they are expected to do (Balch et al., 1976: 275). The idea of the set-up of the courtroom is discussed by Rossner et al. (2017) who discusses the changing courtroom with more secure dockets where the defendant is behind either glass or metal (Rossner et al., 2017). They argue that this may prejudice the jury against the defendant because it makes them look like they are dangerous and have done something wrong. The main socialization goal of voir dire is to make each potential juror familiar with the legal vocabulary and that they begin to understand the procedures enough to function in a courtroom or on a jury (Balch et al., 1976: 277). Voir dire may be an individual's first experience with the courts and can alter how they view the courts and the legal system moving forward.

Another main point of research in regard to the role of voir dire is the impact that the attorneys' questions have on the views of jurors regarding the specific case. The topic of a question in voir dire can alter how a juror votes and what they pay attention to within the trial (Greathouse et al., 2011; Haney, 1984). Haney (1984) showed that when jurors

are asked about their bias against the death penalty, they were then more likely to vote to convict (Haney, 1984). Previous research makes the argument that the topic of questions asked impacts the jury deliberation and final decision on an individual level. The subject of questions asked in voir dire also impacted views of the defendant. For example, whether or not potential jurors were asked questions about juvenile qualifications impacted the probability of defendant guilt, with juvenile qualification questions leading to more defendant guilty verdict (Greathouse et al., 2011: 427). A juvenile qualification voir dire refers to a voir dire for a case where the defendant is a juvenile. Greathouse et al. (2011) show that the subject of questions alters the jurors view, in this case when they were asked questions that were trying to understand their view of how juveniles should be treated in the legal system. When considering these findings about changing juror's views we see that this may be due to voir dire acting as a socialization process. Voir dire acts as a grounding base for their court system experience and therefore, once on the jury, jurors may refer back to the questions they were asked during this time during their deliberations.

When researching gender saliency throughout the voir dire process the socialization aspect of voir dire highlights the necessity of this research. It is possible, if voir dire is socializing the potential juror to the legal system as a whole, then how gender impacts the running of a voir dire will be how jurors expect gender to impact the rest of the system. For example, if gender determines the order or type of questions they are being asked, then a potential juror may expect other aspects of the legal system to differ based on gender. Since the subjects brought up in voir dire can impact case outcomes, there is a potential that the use of gender impacts the way potential jurors view the court

and legal system overall. Additionally, it has been found that in South Carolina death qualification voir dres prosecutors are more likely to eliminate women and African American potential jurors (Eisenberg et al, 2018). Death qualification voir dres are the questioning process to determine if jurors would be able to consider the death penalty as a punishment if the defendant was found guilty. This finding highlights another example of women being more likely to be struck as potential jurors.

The final main focus in previous research on the voir dire process argues that potential jurors also have perceptions of voir dire and their own individual biases. Rose (2003) conducted a mixed method study to assess how individuals viewed the voir dire process, specifically peremptory strikes, after having gone through it. Rose (2003) found that jurors did discuss the use of stereotypes and bias used by attorneys within the jury selection process, they were accepting of their dismissal through peremptory strikes if they believed it to be based on their behavior but the least accepting were those who perceived they were struck based on their own personal characteristics (Rose, 2003: 1066). Attorneys are given a certain number of peremptory strikes, depending on the case, which allows them to remove a juror from the potential jury pool without having to give a reason why they do not want them on the jury. In general, of those who had been removed by peremptory strike, if the decision to excuse a potential juror was based on an attorney's perceived stereotypes, surrounding past experience with the legal system or behavior during voir dire, this did not negatively impact their overall view of the jury selection process. In contrast excused jurors who thought they were excused due to stereotypes surrounding their demographic characteristics were less likely to accept their removal from the jury (Rose, 2003: 1067). It has also been stated that implicit biases that

jurors hold, often about women in the courtroom, are extremely hard to find in voir dire questions because they are unconscious biases that jurors may not even be aware of (Dunham, 2017).

The main findings from Rose's (2003) study argues that the individuals they studied who had been through the jury selection process were overall accepting and understanding of the way the process works (Rose, 2003: 1097). Negative viewpoints stemmed from either stereotype based on personal characteristics, differential treatment based on race or class and a judge's acceptance of a juror's life circumstances that made them unable to serve. Additionally, 30% of individuals discussed fair treatment as decisions of who they removed and 44% of these individuals viewed these decisions negatively (Rose, 2003: 1092). Most participants held negative perceptions of judges' not accepting juror reasons for being excused. Rose's (2003) findings highlight that in general, potential jurors view the jury selection process as acceptable even if the use of stereotypes and perceived biases is present but only if these perceived biases are not purely based on the personal characteristics of the juror but also on the answers they give during voir dire. Rose (2003) calls for further study into gender in the jury selection process outside of juror surveys, by observing voir dices in a courthouse this research will be able to further examine how gender plays out in the process and how frequent the negative events jurors discuss occur.

Other researchers suggest ways to avoid bias in jury selection overall. Rose and Diamond (2008) argue that the set-up of voir dire aims to show ways in which jurors are biased. They argue that jurors in voir dire are not given a helpful description of bias and are therefore not able to determine their own bias very well, this is important when it

comes to answering voir dire questions surrounding bias. If potential jurors are not able to determine their own bias effectively, this impacts whether attorneys are able to find a fair jury. Rose and Diamond (2008) stress that judges have a unique relationship with juror bias in voir dire, because they are seen as the “arbitrator of bias” (Rose and Diamond, 2008: 539). They conclude that judges as the arbitrator of bias and the ability of the judges to determine the outcome of cause challenges, challenges made by attorneys against a juror who they state is too biased to serve on this case, is an important mechanism to remove bias from jury selection. Levett et al. (2005) expand on this by arguing that the power differential between a judge and potential jurors makes it harder and less likely for potential jurors to self-disclose forms of bias that go against social expectations.

Jurors’ perception of legitimacy of the legal system impacts the decisions they make as a juror (Farrell et al., 2012). Farrell et al. (2012) found a strong, positive relationship between trust in courts and positive perceptions of evidence as well as voting patterns. These findings highlight that previous perceptions of the justice system not only create outside bias but also can help decide which side of the case an individual is more likely to fall (Farrell et al., 2012). This stresses the importance of understanding what may impact a juror’s perceptions of the criminal justice system.

Gender in the courtroom

Another major section of previous literature focuses on the role of gender in the courtroom in reference to juries. Gender in the courtroom is discussed mostly based on how the juror’s gender impacts how they view the trial, the evidence, the attorneys, and

how they decide a verdict. The first major finding in past research on gender in the courtroom examines how jurors react to the presentation styles of attorneys. Hahn and Clayton (1996) found that males were likely to vote not guilty for a defense attorney with a more aggressive presentation style, while females were relatively neutral when it came to the effects of presentation style (Hahn and Clayton, 1996: 548). Diamond et al. (1996) found that opening statements had a small impact on juror's views of the defendant, but this was smaller than the publicly believed power of opening statements. Within this study the researchers found that passive presentation styles by defense were less likely to get an acquittal because jurors found this style boring and easier to be distracted during the trial (Diamond et al., 1996: 548). These findings by both Diamond et al. (1996) as well as Hahn and Clayton (1996) highlight that how attorneys act within a trial does have an impact on juror perceptions and trial outcomes, at least when it comes to male jurors.

Clayton's (1996) finding stresses the importance of trial techniques and therefore gender may still play a role in a juror's view of both attorneys and the court system as a whole. Trial techniques are the ways in which attorneys present their case during a trial, whether that be passive, aggressive, or a combination of the two. Diamond et al. (1996) as well as Hahn and Clayton (1996) show that trial techniques impact different genders of jurors differently, this is then used by attorneys to alter their case presentation based on the jury they have. It is important to note that another study found no significant impact of a defendant or attorney sex on a juror's decision whether different or similar to their own sex (Cohen and Peterson, 1981). In Cohen and Peterson (1981) they argue that more studies should be focusing on race because this was the only significant result they found, they saw no relationship between attorney sex and juror sex on juror verdicts. This claim

should be taken into consideration but be considered within the research of others within the process. Hahn and Clayton (1996) show that female and male jurors react differently to presentation styles therefore arguing that gender does influence this relationship. This debate in the literature focuses on the relationship between the same or different gender of the jurors and the attorneys and because of this it is necessary to study gender within the court system further.

The second major point found in previous literature in regard to how jurors view attorneys is the differences between defense and prosecution. Previous studies found that opening statements of prosecutors are generally viewed more favorably by jurors (Linz, Penrod, and McDonald, 1986). This was due to the finding that prosecutors were seen, by jurors, to have better trial techniques than the defense attorneys (Linz, Penrod, and McDonald, 1986). This result was found from their survey where jurors stated that prosecutors were more articulate, enthusiastic, likable, and friendly while being less arrogant and nervous than defense attorneys (Linz, Penrod, and McDonald, 1986: 293). These findings show that generally jurors are more likely to find prosecutors credible rather than defense attorneys.

On the other hand, there are previous studies that look at the way defense attorneys are viewed. Brewer (2005) found that the jurors were more likely to vote not guilty for defense attorneys who showed more of a working relationship with the defendant. Brewer's (2005) findings show that there are some ways in which the defense attorneys may be viewed as more credible and is related more to how they interact and less what they present; this often varies by gender. Jurors may also view attorneys differently based on the attorney's gender. Negowetti (2015) surveyed attorneys and found that 86% of

males reported that all attorneys were treated equally but only less than half of female respondents agreed with this statement. Pynchon (2012) discusses a survey done by Decision Quest that found 97% of jurors saw female attorneys as equally qualified to male attorneys and the remaining 3% saw female attorneys as more qualified. Another study entitled “Beating Bias” (2017) found that men report preferring to hire male attorneys. Who women prefer to hire is an interesting shift, Goodman (2017) reported that females prefer to hire white male attorneys to a white female attorney but would prefer to hire female to males of any other racial group. Here we see that juror’s perceptions of the effectiveness of female attorneys are just as qualified but also argues that jurors believe female attorneys are less respected by others within the legal system and that this undermines their credibility within the trial (Goodman, 2017: 172).

The American Bar Associations Commission on Women in the Profession and the Minority Corporate Counsel Association (“Bias Interrupters”, 2018) surveyed 2,827 lawyers and found that female lawyers, especially women of color, were more likely to face hardships than men. These included being interrupted, being mistake for court staff and not lawyers, doing more office work, and to not be assigned the better cases (Elsesser, 2018). This highlights the saliency of gender in the courtroom outside of the jury. This survey also found that female attorneys reported feeling like they could not be too assertive otherwise they would be seen as not “lady like”. These self-reports show how gender stereotypes translate even into attorneys and how they interact with each other. This further may impact how female attorneys choose to present their case and run their voir dire sections because they are aware of how they may be perceived in relation to their gender.

Previous research has also examined how gender impacts jury decision making in general. Fowler (2005) explains studies that have found mock jurors are more favorable of same sex defendants by using Carol Gilligan's research on gender and moral reasoning. Gilligan's (1982) moral reasoning argument states that men and women have different steps of moral reasoning. Moral reasoning is the development of morality decision making in stages. She argues that male moral reasoning is what has been studied in psychology and the female form of moral reasoning is seen as abnormal. Overall, she argues that women have a moral reasoning that deals more with responsibility and care than men and this creates communication problems. Fowler (2005) uses this argument to make a claim about the findings in mock jury research. She says because women mock jurors were more likely to report feelings of empathy and discuss mental health care Gilligan's argument that women are more likely to "consider the network of human relationships in their judgements of moral or, in this case, legal problems" (Fowler, 2005: 21) continues to be applicable to the legal system. Through this she claims that these perceived differences in moral reasoning creates differences in jury decision making between genders.

It is also important to note that research on gender in the courtroom specifically dealing with juries is consistently older, newer research on gender in the courtroom focuses on the gender of attorneys, judges, and defendants but not their intersection with jurors. This continues to display the importance to take an updated look at gender in the courtroom and see if what has been previously found still holds and what has changed. Along with the need for newer research it is still important to discuss the applicable parts of past research that have been brought up in this section, the power relationships and

perceptions of jurors/potential jurors are still valid to today's court system, especially considering the core elements of the voir dire process have not changed for many years.

Summary: Gender and Voir Dire

Past research has studied gender within the courtroom, finding that males were likely to vote not guilty for a defense attorney with a more aggressive presentation style, while females were relatively neutral when it came to the effects of presentation style (Hahn and Clayton, 1996: 548), opening statements of prosecutors are generally viewed more favorably by jurors (Linz, Penrod, and McDonald, 1986), and jurors believe female attorneys are less respected by others within the legal system and that this undermines their credibility within the trial (Goodman, 2017: 96). Previous studies have focused mainly on preventing discrimination within jury selection instead of focusing on juror's perceptions of their voir dire experience. After *Batson v. Kentucky* (1986), the U.S. Supreme Court heard *JEB v. Alabama* (1994) and ruled that peremptory strikes only based on gender were also discriminatory and therefore, unconstitutional (Ferdico, 1995). It is important to note here that although this has been deemed unconstitutional there are ways that some attorneys fabricate other reasons to get around these rulings, this brings into question the effectiveness of the court rulings (Kovera, Dickinson, & Cutler, 2003). As previously discussed, these studies set the stage for research on gender and the voir dire process.

When it comes to female potential jurors, the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (2001) conducted a study that included gender's influence in jury selection. They had three main findings: 1)

women jurors face more obstacles to serving, such as finding childcare; 2) that economic hardships due to jury participation were faced by both genders; 3) and that the dynamics that play out in the jury room can work against female jurors (Pennsylvania Supreme Court Committee, 2001: 106). They also found that females were less likely to be selected for jury than males.

The first two hardships faced by female jurors are outside of the realm of the process of jury selection but the finding that highlights the interpersonal dynamics within the jury room may impact the potential female juror. This final finding suggests that female jurors are selected at lower rates and are less likely to be the presiding juror, this may be affecting attorneys because they are asking the questions during voir dire.

In addition to the research on gender in jury selection, juror's own thoughts on gender's influence of their own voir dire experiences have been studied. In a self-assessment completed after completion of a jury trial, jurors reported believing that peremptory strikes were used with assumptions and stereotypes about jurors, but only perceived this as negative when the stereotype or assumption was only regarding a personal characteristic of the juror as opposed to the answers that they gave in voir dire (Rose, 2003). Eigenberg et al. (2012) also conducted a survey study aiming to see jurors' opinions on gender within the voir dire process. They found that

“Even though women were over- represented in the sample, we found that views about gender neutrality were more predictive of system fairness than a respondent's biological gender (or age). This finding illustrates the importance of viewing gender more as a process and less as a static characteristic or an individual trait” (Eigenberg et al., 2012: 272).

Through juror's statements Eigenberg et al. (2012) argue that the gender of a juror is not as predictive of their perceptions of fairness as their view of the role gender played in the

jury selection process. Whether the juror is a man or a woman is less important than how they perceived being treated because of this identity. It is not their gender that is a predictive factor but it is how their gender alters how they are treated and if potential jurors see this as stereotyping or gender bias. This finding may impact how individuals view the justice system moving forward based on their view of gender based jury selection.

On the other hand, there are arguments made that gender-based jury selection decisions are necessary for certain cases and not discriminatory. Garcia Toro (2015) argues that gender-based jury selection can be useful because individuals have different life experiences based on their gender. Garcia Toro (2015) argues that there have been findings that suggest women and men will vote differently on different cases, with women being more likely to vote guilty in sexual assault or rape cases and men being more accepting of violence (Garcia Toro, 2015: 68). This argument is supported in sociological research, it has been found that women and men vote differently during trials based on the case (Richards et al., 2016; Pettalia, Pozzulo, & Reed, 2017; Bottoms et al., 2015).

These apparently contradictory findings show varying reasons attorneys may use to strike based on gender. This research base helps to motivate this thesis by highlighting reasons attorneys may make gender-based jury selection decisions. It has already been shown that gender within the court system results in different experiences for males and females, and that they are selected at different rates for juries of specific types of trials. This thesis aims to determine whether part of this process involves different treatment of individuals during voir dire based on their gender

Chapter 4: Methods

The Process of Voir Dire

Voir dire is a part of the jury selection process where potential jurors are asked questions by the defense, the prosecution, and the judge. There are two types of voir dire, group and individual. Group voir dire is when all potential jurors are asked questions, this can be asked of one person or the group as a whole, in the same room. In individual voir dire the attorneys and the judge meet with each potential juror on their own and ask them a series of questions about their ability to be unbiased within the circumstances of this specific case. For this research, group voir dire was observed to better understand the role of gender and to be able to compare how the same attorney interact similarly/differently with male or female potential jurors. After examining my results from observations of voir dire in two different counties I argue that there are four main ways that gender is salient throughout the jury selection process; the use of gender titles, reactions to gender expectations, a change in attorney presentation style through repetition, and juror pushback.

To answer my research question of how is gender salient in the voir dire process, I observed five voir dieres in Washington County, Oregon and one in Multnomah County, Oregon with a total of 154 potential jurors between these six voir dieres. Potential jurors, and therefore my sample, are chosen by each county. The coding I used was adapted from O'Brien, Grosso, and Taylor (2017) which is a form of the Roter Interaction Analysis System for conversation analysis that they adapted to be used in courtroom settings. This form of coding has 46 coding schemes and focuses on the types of questions (informative, personal, etc.) asked to each individual and the form they are

asked in (open or closed ended). This coding scheme also focuses on the process of the conversation by coding personal remarks, criticisms, reassurances, and the interactions between two individuals. These 46 schemes are each applicable to one of four themes which include data gathering, education/outreach, relationship building, and conflict. This form of conversation analysis is the best way to code voir dire because it enables me to analyze the whole interaction between the attorney/judge and the potential juror instead of just the type of question being asked. This coding structure was adapted to create a coding sheet for this process to be best used in a courtroom. There were categories for Agreements, Asks, Attorney/Court only, Checks, Closed Questions, Disapproval, Open questions, General, Leading Questions, and Body Language (see Appendix 1 for the coding form used in this study).

Potential jurors receive a jury summons and those who are not excused are required to appear. Jurors may be excused if they no longer live in the county, if they are under the age of 18 or if they have an appointment or commitment that they prove is unavoidable. Voir dire is open to the public and the schedules for the week are posted online of where and when voir dire will be taking place and for what case. Between July and September of 2018 I went to a courthouse twice a week. In both courthouses jury trials, and jury selection, only happens between Tuesday and Thursday and they all start at the same time. Most cases that were set for trial were postponed due to motions made by the attorneys, one side not being ready for trial, or the case was dismissed with the option to take it to trial at a later date. During the second trial I attempted to watch, a court officer told me that trial postponements were common, and recommended asking the information desk which case that day was more likely to go to jury selection. I was

able to do this in Washington County but the information desk in the Multnomah County courthouse was not staffed most of the time. From the second week on I began asking the information desk when I was able to and they would direct me to the case they perceived as likely to at least reach jury selection that day.

Once in the courtroom I sat in the public seating area. Sometimes I was asked what I was there for or if I was a witness in the case. When this occurred, I would let them know that I was a graduate student in sociology. They would then normally ask me if I wanted to be a lawyer and I would explain that I am interested in studying the dynamics of juries and specifically voir dire. There was a lot of time before trials so most times this would lead to attorneys or court staff telling me more about the case that was about to be heard, the details of the charges, and the alleged sequence of events. I then would sit through the pretrial motions and the attorneys receiving the juror questionnaires. Once this was completed, they would bring potential jurors into the room and I began coding attorneys and judge's interactions and questioning of potential jurors. I would start by writing the descriptions of each juror on a coding sheet. Each juror had their own coding sheet so that I could later record their specific interactions with attorneys. No names were recorded throughout the jury selection, if the attorney referred to an individual by their last name I would only write "Ms./Mr. ____". Once voir dire began I would jot down notes in each coding category for each attorney/potential juror interaction on the appropriate potential juror coding sheet. It is important to note here that the recording of demographics of individual potential jurors and attorneys, such as gender and race, was based on my own observation of the individual and not their self-reporting.

Overall, I observed six voir dres, five in Washington County, Oregon and one in Multnomah County, Oregon. I went to both counties in hopes of seeing if there were differences in voir dire procedures or the saliency of gender. I stopped collecting data at the end of September. I went to the Multnomah County courthouse 3 weeks in a row and was unable to watch a voir dire due to none happening so I stopped data collection and began coding. I was able to watch voir dres for cases involving charges of trespassing, assault (twice), sex offences against a minor (two different cases had this charge), and violence against a peace officer. Within all the cases there were seven female attorneys (five defense and two prosecution) and five male attorneys (one defense and four prosecution). Potential jurors were 53.8% female and 46.2% male. There was only one Hispanic attorney, the rest were Caucasian. Potential jurors were 80.4% white, 1.9% African American, 7.2% Hispanic, 9.8% Asian/Pacific Islander, and 1.3% other.

To analyze the collected data, I used a general deductive approach. I started by examining the coding sheets for general themes and examples of how these themes are seen throughout a majority of the voir dres observed.

From the coding sheet used in voir dire each interaction was written out into a notebook and then read through in search of main themes. The interactions were then coded for repetition, discussion of jobs, use of gender titles, and juror reaction to attorneys either negative or positive.

Over the summer of 2018 from July 1st through October 1st I was able to attend six voir dres, five in Washington County and one in Multnomah County. A total of 154 potential jurors were observed. The voir dres ranged in size from 16 potential jurors to 45 potential jurors. The size of the potential juror pool depended on whether the case was

a misdemeanor or a felony trial, I observed 3 of each type of case. Misdemeanor trials required six-person juries so their pool could be smaller, whereas felony trials needed 12 (sometimes a 13th alternate) jurors. I went to the courthouses twice a week, I was informed by the clerk at the front desk which days of the week were more likely to end up with jury selections. Once I had asked the clerk which courtroom was the best to sit in on I would go in when the room was open. I tried to let attorneys and clerks know that I was a master's student, many times they would ask me why I was there when I walked into the courtroom. This was common practice because if I was a witness who was testifying I would have needed to be outside the courtroom. Most attorneys, judges, and court personnel were very open with me once they knew I was a student, often asking me questions about my career path and telling me information about the case itself. Most times when I was first in the room it was just me, both attorneys, court bailiffs, court clerks, and defendants. One specific court bailiff I saw multiple times, when I walked in, he would greet me, tell me about the case, and introduce me to the defendant if they were someone he had dealt with many times and they were polite. Once the judge took the bench, I sat on whichever side of the courtroom the clerk instructed me to (the other side was where the potential jurors would sit) and began jotting notes on my coding sheet, this is when I would note attorney demographics. After pretrial motions, potential jurors were brought into the room. I had no interaction with potential jurors, this was something I purposefully avoided to not hinder a case in any way due to the previous knowledge of the charges I often had. Throughout my coding many potential jurors did look over at me, due to this I made sure to not be writing when someone was talking about something personal or emotional and would only jot this down later. During observations, I would

take note of the questions attorneys were asking and as much of the potential juror's response that I could summarize. I would determine which box the interaction fit in on the coding sheet (See Appendix), attorneys would pause between interactions to look at their papers so this gave me adequate time to make thorough notes.

Chapter 5: Results

I sat in on many cases, some which ended in acceptance of plea deals and many whose trials were pushed back in need of further information to be ready (medical/mental health exams, more time to reach witnesses, etc.). The criminal charges for the voir dieres I witnessed varied from misdemeanors to felonies, they can be seen in Table 1. Within all the cases the gender of attorneys and racial backgrounds of potential jurors can be seen in Table 2 and Table 3. I also noted who was selected for the final jury.

Table 1: types of cases observed

| Misdemeanor | Felony |
|-------------|----------------------------------|
| Trespassing | Sex Offences against a minor |
| Assault | Sex Offences against a minor |
| Assault | Violence against a Peace Officer |

Table 2: Attorney gender and type of attorney

| | Prosecution | Defense | Total |
|------------------|-------------|---------|-------|
| Female Attorneys | 2 | 5 | 7 |
| Male Attorneys | 4 | 1 | 5 |
| Total | 6 | 6 | |

Table 3: Race breakdown of potential jurors

| Race | Percent of Potential Jurors |
|------------------------|-----------------------------|
| White | 80.4% |
| African American | 1.9% |
| Hispanic | 7.2% |
| Asian/Pacific Islander | 9.8% |
| Other | 1.3% |

Potential jurors were 53.8% female and 46.2% male. There was only one Hispanic attorney, the rest were Caucasian. Additionally, I coded and documented which potential jurors were selected to be on the jury:

Table 4: Demographic breakdown of selected jurors

| Gender and Race | Number of selected jurors |
|-------------------------------|---------------------------|
| White Male | 19 |
| White Female | 23 |
| African American Male | 1 |
| African American Female | 0 |
| Hispanic Male | 1 |
| Hispanic Female | 2 |
| Other female | 1 |
| Asian/Pacific Islander Male | 1 |
| Asian/Pacific Islander Female | 1 |

Previous research highlights that females are less likely to be selected for juries and less likely to be forepersons (Pennsylvania Supreme Court Committee, 2001) but that was not found in this research. In this research females were the minority final jury make

up in only one (five males one female), were tied with males in two (six males and six females), and were the majority in the other three (two males and four females, two males and four females, four males and nine females). This is an interesting difference and shows that these trials differed in gender make up of final juries from what is commonly seen in the literature.

When looking at how gender is salient in the voir dire process, I found that the gender of a potential juror impacts the questioning and presentation style of attorneys which may be a factor in the make-up of the final jury. Throughout the observations of voir dires there were four overarching themes that show the saliency of gender. Marital status assumptions, gendered expectations, repetition, and juror pushback were apparent in each jury selection.

Gender and Marital Status Assumption

When attorneys are asking questions in a voir dire they often need to refer directly to one juror. Some do this through pointing or gesturing, some ask questions in a systematic order so the juror knows when they are the next to be asked, but some did this by referring to a potential juror as Mr./Ms./Mrs. Within the voir dires I observed a potential juror was referenced by the marital status in all 6 voir dires. The latter tactic led to attorneys having to make some assumptions of gender and marital status based on looks and age. These tactics reflect an attorney having to identify a person by a binary gender and thus stress the saliency of identity within the context of the court systems. Additionally, to determining a gender based on looks and then having to refer to someone's marital status the attorneys also often assumed marital status for females. There is not an equivalent differentiation between a married man or a single man as there

is with women and the use of Ms. or Mrs. Instead of using the universal Ms. if they were unsure of a women's marital status, most attorneys would use Mrs. for women who they perceived to be older. Here we see differences between gender and age. Gender being that only women were able to be referenced by marital status, this was not of the fault of the attorney but rather shows a way in which gender is salient in this and all environments.

Age was also an influence here as only women who looked older were referenced as Mrs. Individuals had a negative reaction to this form of reference was when gender or marital status were assumed incorrectly. I assessed this by observing the visible negative reaction there may be times where individuals reacted negatively that went unnoticed. In one jury selection, a male defense attorney referred to a potential juror as "sir", the potential juror corrected him to say "Ma'am". The defense attorney then apologized but the potential juror told him it was fine, and it happened all the time because of her haircut. The defense attorney seemed to be more impacted by this interaction than the potential juror did. This was a relatively neutral interaction, but this was not always the case. In a different jury selection in Washington County a male defense attorney referred to a female potential juror as "Ms. ____", she was quick to correct him that she was actually a "Mrs." After this encounter, he would emphasize her marital status in her name more than anything else in the sentence. This led to grimaces from this particular potential juror, and many other jurors around her. The male attorney continued to emphasize her marital status because he got it wrong, this displays the saliency of gender identity in this situation because it is continuously brought up. This example highlights not only an attorney being corrected but the reaction to a correction. The two different

reactions also point to the ways in which marital status and gender are salient, both showing that assumptions are considered, made, and sometimes debated. These interactions speak to West and Zimmerman's (1987) doing gender theory, these potential jurors are still doing their gender throughout the process and have to discuss it, because it is always being considered by others in the room.

In contrast to the previous examples, other attorneys took gender corrections differently. In another jury selection, a female prosecutor stated "Are you frustrated with the general process?... Ms. ____? ... Ms. ____?" The potential juror (Female, white) responded "You mean Mrs. ____?" The prosecutor responded with "So sorry" and then did not mention it for the rest of their interaction. These two different reactions show the ways in which attorneys can control how the reaction is perceived. The defense attorney's continued reaction to the correction led to what I perceived to be a negative reaction by both the potential juror he was talking to and surrounding potential jurors. Whereas, the prosecutor's reaction and apology made it so the conversation could continue with a similar interaction. The use of these forms of gendered titles shows the awareness of gender and labels that stem from gender for both potential jurors and attorneys. While the attorneys in these situations were both male and female, it was always female potential jurors who were mislabeled in marital status because there are no words in the English language to differentiate a married man or a single man. Within this discussion it is also important to note that the times I was aware of marital status it was because the potential juror corrected the attorney, I was unable to tell if there were more mislabels that were not brought to the attorney's attention because I did not have access to any personal information, like marital status, of the potential jurors. The use of gendered titles and

marital status related back to the assessment section of West and Zimmerman's (1987) doing gender theory. By referencing an older female as Mrs., we see that their gender has been assessed and assumptions based on gendered expectations have been made about their marital status. Therefore, the use of gendered titles (Mr./Ms./Mrs.) and marital status (Ms./Mrs.) shows that the theory of doing gender is applicable in voir dire as assessments of the process of gender are made from the very beginning of their interaction.

The issue of mislabeling and the use of marital status becomes even more important when we consider that voir dire is the socialization of potential jurors into the court system (Balch et al., 1976). Throughout this socialization process they are shown that gender is not only considered in how they are interacted with but also that this can be misconstrued based on their appearance. These findings continue to support previous literature on gender and stereotypes in the jury selection process. Past literature found that those excused jurors who thought they were excused due to stereotypes surrounding "their personal characteristics were the least accepting of their outcome [being excused from jury duty]" (Rose, 2003: 1067). This is impactful because it shows potential jurors view striking jurors based purely on personal characteristics negatively. These results support jurors noticing gender and stereotypes, it also shows the impact that the use and misuse of gendered titles may have on further perceptions. If it is believed that the use of gendered titles leads to a potential juror being struck this will negatively impact the view of all the potential jurors. Not only does this impact how voir dire is run and who may end up on the final jury, but it also holds implications for all potential jurors in the room. As was suggested by Rose (2003), any form of discrimination seen in voir dire does

impact how they view the system as a whole moving forward. Therefore, these results hold immediate implication for this specific voir dire and specific trial but also for views of the legal system in the future. The discussion of marital status and its relation to gender could lead these potential jurors to believe gender matters not just in the voir dire process but in the legal system as a whole. This could greatly impact their views of legitimacy.

Gendered Expectations

Following on from assumptions of gender titles and marital status, interactions between attorney and potential juror were different when a potential juror's job fell within or outside of societal gendered expectations. The discussion of what a person's occupation was came up multiple times in all six jury selections. This shows that reactions to within or outside of expectations jobs were present in all voir dices. Response to juror answers that seemed to be based on gender were not exclusive to jobs, it did also happen in reference to children or political views, but job discussion was consistent throughout all of the jury selections. Reactions from attorneys consistently differed between expected and unexpected job choices for male and female jurors. In the Multnomah county jury selection, although they had all stated their occupations to the group, the female defense attorney proceeded to discuss jobs with two jurors. The first juror was an African American male who previously discussed that he was a nanny. The interaction went as follows:

Defense attorney: "What kind of work do you do?"

Potential juror: "I'm a nanny"

Defense attorney: "A nanny? How did you get into that?"

Nannies, or any work that surrounds children, are more often perceived as jobs that are done by women. The fact that the next question the attorney asked was an ask for repetition and was followed by asking how he got into that work shows that the defense attorney was not expecting him to be in this career field. It is important to note here that this interaction was drawing attention to his career of choice being different, especially when considering that this was the second time he had been asked to discuss his occupation that fell outside of what is expected from a male because at the start of the voir dire all potential jurors were asked to answer a set of questions, one of which asked their occupation. This relates back to West and Zimmerman's (1987) theory of accountability because it shows that an individual's actions, such as their job, is being judged in reference to their gender. Additionally, intersectionality of gender and race had an impact on the reaction he received. This is one of the only examples throughout the jury selections in which the race of juror likely contributed the reaction they saw due to the low levels of diversity within my sample. Here the juror was not only a male nanny but also an African American male nanny, he had both stereotypes playing against what individuals expect of him. Some other potential jurors showed some signs of surprise when he said his occupation, this was noted through raised eyebrows or looks of surprise. The prosecutor showed no reaction. The intersectionality was more than likely a big factor in the attorney's response to his career choice.

Those potential jurors whose jobs fit into gender expectations received a more positive interaction. In the same jury selection as the previous example, a female, white potential juror had reported that she was a teacher. The defense attorney then started this

line of questioning with her:

Defense attorney: You said you're a teacher, are you teaching now?

Potential juror: Yes, I teach kindergarten

Defense attorney: [laughs] Kindergarten doesn't drive you crazy?

Potential juror: No, I love it

Defense attorney: Is there a curriculum you have in kindergarten?

The interaction between attorney and potential juror was more positive and joking than the shock seen in the previous interaction. This conversation seems to be a way for the attorney to build rapport with the potential juror. Through laughing and asking the typical questions of a teacher, "doesn't [kindergarten] drive you crazy?", the defense attorney shows a certain level of approval. This interaction implies the attorney is more impressed that the female potential juror is able to deal with kindergarteners. There is another element of this interaction as well, by asking if there is a curriculum that the potential juror follows in kindergarten the attorney ignores the training of teachers. This question assumes that there is not a set level of training and professionalism required by teachers, so this interaction also comments on what is seen as a female career field as less professional. Both of these examples are the same defense attorney and both occupations work with children, the difference in reaction highlights that it is the gendered and racial differences between potential jurors that create positive or negative interactions. These two different styles of questioning by the attorney continues to support that gender influences attorney's questioning style.

There were also gendered expectations of relationships to children shown throughout many of these jury selections. In a voir dire for a child abuse case in

Washington County many of the defense attorney's questions focused on the potential juror's relationship to kids. This included asking everyone if they worked with kids and if they had kids. All female potential jurors were first asked if they had kids and then if they worked with kids, whereas male potential jurors were first asked if they worked with kids and then if they had kids. This switch in and of itself displays an expectation based purely on the gender of the potential juror. Men were first asked about their working relationship with kids, following the stereotype that men spend more time out of the home. Women were first asked if they had kids of their own, following the stereotype that they were more likely to be a stay at home parent and/or to assume most childcare duties. Now although all those who answered yes to either of these questions were asked if they would still be able to be fair considering their proximity to children, other follow up questions differed by gender. For example, a white male potential juror responded that he had four children, which elicited no other response from the attorney. Counter to this, a white female potential juror said that she had three kids, and this was followed up with a question about how old are they? These examples were seen over and over again in varying forms, most involving females being asked about their children while men being asked less about their children, and more often about their jobs. This follows with stereotypes that women are supposed to talk more about, and be more responsible for, their children than men. Throughout all six jury selections these themes of gendered surprise and expected explanations were present. Through the reactions and discussions of gendered expectations we see another example of gender being salient in another part of the voir dire process. Gender was apparent and visible in voir dire and impacted the ways in which people were treated and the behaviors people portrayed. Gender seems to

have influenced the structure of voir dire as well as highlights the gender structure of the process.

Repetition

Juror gender.

One aspect of an attorney's presentation style is their use of repetition. This can be in the form of asking for clarification, asking for understanding, or repeating a potential jurors' answer to the room. This was often used by attorneys, both defense and prosecution alike, to bring attention to a point they were trying to make. For example, in one jury selection the defense attorney asked the potential juror "Why does the state have the burden of proof?" and the male potential juror responded by saying "Because they are the ones who made the allegation" to which the defense attorney stated "right, perfect answer!" Throughout the rest of the process the attorney referred back to this potential juror, and this specific answer two more times. The repetition of coming back to the answer multiple times throughout the voir dire process is a tactic to make this point through a potential juror and not themselves. In a separate jury selection, the following interaction occurred between a male defense attorney and a female potential juror:

Defense Attorney: What is the difference between innocent and not guilty?

Potential Juror: "Innocent means they didn't do it, not guilty means they didn't prove it"

Defense Attorney: "Exactly, the practical answer"

This is similar to the previous example but differs after the interaction has ended. Unlike with the male potential juror, after this interaction the defense attorney did not reference back to the female potential juror's answer even though they reference it as another good

example of the point they were trying to make. More often, across all jury selections, female potential jurors' answers were more likely to be referenced as good answers but not be reiterated after the interaction. Male potential jurors had their answers repeated and referenced in four out of the six jury selections. On the other hand, male potential jurors were more likely to have their answers referenced later in the jury selection. This continues to show that gender plays a role throughout a jury selection, this does not mean that these answers individually were only repeated because the potential juror was male but it highlights that overall the gender of a potential juror impacts how they are viewed and how their answers are discussed.

Potential jurors did pick up on this technique and some did mention that repetition was happening. The first example of this was when a defense attorney asked a question that the potential juror had already answered. The attorney asked, "What makes you feel unsafe Ms. ____?" The female potential juror then responded, "as I said before..." This potential juror made it clear that she noticed that she had already answered a similar question but did not explicitly state it. The repetition of questions or information was present in all six jury selections. This reaction demonstrates that the effectiveness of techniques varies with the individual potential juror which may offer support to change the technique for different demographics. There were some potential jurors who were more direct in noting the repetition. For example, in another jury selection a prosecutor explained the process to a potential juror after just explaining it to the group as a whole. The female potential juror then responded, "I know, you said this already." The difference in potential juror tactic of calling out the repetition continues to support that techniques work differently with each individual person. Here we see that not only is

gender potentially a reasonable explanation for the reaction of attorneys to similar questions but gender may also influence the techniques used by attorneys as well as the reactions of them. The only potential jurors to explicitly state that they had noticed the repetition were female. Similarly, it seems that attorney gender has little impact on the specific technique, but that does not mean it alters the way in which the technique is presented based on the attorney's gender. This repetition being different based on gender could show that these attorneys are aware of what meets their goal of voir dire best for women as opposed to males. This speaks to the gender structure that is apparent in the jury selection process.

Attorney gender.

With repetition, male attorneys were more direct in the way they used repetition than female attorneys were. For example, in a Washington county jury selection repetition was used by a female defense attorney in the way of question order. This defense attorney asked the same two questions to every juror. Because of this, the repetition seemed intentional and important, so no potential juror made a comment or seemed to be frustrated by the similarities. Gender of the potential juror was also important in this repetition example. The two questions asked were if the potential juror had children and if they worked with children. Male potential jurors were first asked if they worked with children and then if they had any, whereas female potential jurors were asked in the opposite order. These forms of repetition were seen at least once by each female attorney and all but one of the male attorneys. From these interactions, we see an individual's gender being important, in the way the repetition is given and who it is given to. On the other hand, a male attorney was repetitive of individual answers more than

question order. Asks for understanding or clarity were more common in male attorneys, this was a technique that they seemed to choose more often. Overall, male attorneys took a more aggressive technique to repetition by stating the same phrase over again and referencing the repetition when asking for understanding. This was seen when attorneys would say things along the lines of as “I said before” or “I know I said this to someone else but”, these techniques highlight that the attorney is bringing attention to the fact they are having to ask again. These are classed as aggressive because they are more upfront and may be more likely to create a negative experience. A passive technique was seen by a female defense attorney towards a female potential juror, the defense stated, “I think what you’re getting at is _____, is that right?”. This technique is passive because it is confirming what the potential juror stated in a way that is non-combative. This is important because previous literature has found that aggressive vs. passive techniques impacts male and female potential jurors differently (Hahn and Clayton, 1996). Male potential jurors are more likely to vote with an aggressive defense attorney whereas female potential jurors were neutral on this issue. This continues to show the importance in studying gender in the voir dire process because it not only impacts who is chosen for the jury but also how they vote once on the jury. Within this discussion it is also important to note that these findings go against Cohen and Peterson (1981)’s findings that gender of the attorney had no impact on juror outcomes. Although, Cohen and Peterson (1981) were looking at juror voting and not the voir dire process so this may cause different results.

These differences in all areas of repetition show the gender structure within the jury selection process. The use of gender is worked into the process and seems to be used

strategically. The strategy of repetition within presentation style is an example of gender being considered in the structure of an argument and how an attorney chooses to run a voir dire. It may show that one gender of attorney has seen what works better for them in front of an audience so this is the method they choose to continue. What works best may differ based on the attorney's gender. This is embedded in the structure of the process and continues to show how large genders presence could be. Gender structure is also seen in how attorneys talk to potential jurors. The repetition of question order highlights that societal gender structure is still present within the court room and continues to influence how we consider the behavior of or what we expect from males and females.

The repetition use by male and female attorneys supports what previous literature discusses surrounding attorney voir dire techniques and reactions to these techniques. The literature surrounding attorney techniques discusses the difference between prosecutors and defense attorneys throughout the trial (Linz, Penrod, and McDonald, 1986). This was not seen in the current research as there were not many differences that stood out between defense and prosecution explicitly. Prosecutors spoke much less often than defense attorneys in both Washington and Multnomah county.

One main difference from previous literature that this research found was the frequency of female potential jurors who were selected for the final jury. The Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (2001) stated that females were less likely to be selected for jury than males. In this study, out of the six total jury selections, females were the minority final jury make up in only one (five males one female), were tied with males in two (six males and six females), and were the majority in the other three (two males and four females, two males

and four females, four males and nine females). Although three of these cases involved child abuse, which previous literature would predict to be majority female (Pettalia, Pozzulo, & Reed, 2017; Bottoms et al., 2015), there was still only one majority male jury.

Chapter 6: Discussion

Through the observations of six jury selections, this study examined how gender is salient within the jury selection process. The findings are consistent with past research in that gender influences how presentation styles are received by different potential jurors (Hahn and Clayton, 1996). Although this study differs from previous literature that suggests females make it on to the final jury less (Pettalia, Pozzulo, & Reed, 2017) this may be due to the high number of child abuse cases within the jury selections since attorneys tend to prefer female jurors on child abuse cases (Pettalia, Pozzulo, & Reed, 2017; Bottoms et al., 2015).

The reactions of potential jurors and attorneys demonstrate the ways in which gender is salient throughout voir dire. The use of gendered titles and Mrs./Ms. highlights the awareness of gender and brings it into the discussion. The reactions to the misuse of gendered titles creates a small amount of tension surrounding gender, either for the potential juror or the attorney, it can impact the rapport attorneys are trying to build with a potential juror who may have the power to help decide the outcome of the trial. Gendered expectations are also dealt with differently, meeting or going against what is expected of a specific gender, whether that be in career choice or action, leads to different reactions from attorneys. Potential jurors are asked different forms of questions or treated differently based on these reactions. From this, repetition is used differently for male and female potential jurors, showing that gender impacts which presentation style or technique the attorney uses. Overall, gender is salient in all parts of the process and plays a role in most things, from questioning style to how the conversation is started, and even to who ends up on the final jury. The findings are also consistent with West and

Zimmerman's (1987) theory of doing gender. They show that gender is more than just a characteristic considered when striking potential jurors from a jury, that it is a process present in all aspects of voir dire. It impacted the language in which attorneys and potential jurors used to describe each other through gendered titles and therefore sometimes causing conflict. The presence of gender is used throughout all of voir dire and can be seen in the use of repetition and attorney style and can lead to juror pushback. The theory of accountability is also highlighted when we see gendered expectations, specifically through the job example given in the results chapter, here potential jurors are reacted to differently whether they are accountable to what an expected career field for their perceived is. When they do not meet this expectation, they face a negative reaction. It is also important to highlight that gender structure could have had a significant impact on the results that I observed. These attorneys could be purposefully making decisions based on past experiences and results. If they have found that asking specific questions to females or repeating males answers more improves their rapport and makes the juror more likely to listen to them over the other side then it makes sense why these gendered interactions continue to happen. It is important for future research to dive further into the process that attorneys make when planning how they will organize their voir dire questions.

This research did face some limitations that can be used to suggest future research. One struggle throughout the observation period was distinguishing what class category each potential juror may fall in. While race and gender had physical characteristics that to some extent made it easier to define which category an individual fell into, class lacked these physical signs. There were some clues that could have

assumed class but these were not present for all potential jurors so was not used. Some clues included how the potential jurors dressed (suits or casual) although this was not reliable. In Multnomah county, potential jurors were all asked to report their occupation, but this does not take into account range in pay or other potential household income. This question, although probably the most reliable clue to class, was not consistently asked in Washington county as it was in Multnomah county, so it was not used to discuss class in this research. For future research, it would be beneficial to have a more reliable indicator of class. Knowing the class of potential jurors would enable researchers to determine if this also impacted the interaction between potential juror and attorney. Class differences may increase the power dynamic between judge/attorney and potential juror so may impact how comfortable the potential juror is in disclosing personal information. Access to jury questionnaires that the lawyers are given before potential jurors enter the room would greatly help this measure. The inclusion of class in future research would better be able to generalize the impact of gender.

The data collected in the study is in line with what previous literature has found with the basis of voir dire questions. Previous literature has found that the topic of a question in voir dire can alter what a juror pays attention to within the trial (Greathouse et al., 2011; Haney, 1984); my research suggests that these questions, and juror gender can affect the jury selection process itself. This stresses the importance of understanding attorney question techniques. The repetition differences presented to male and female potential jurors could later impact what evidence each juror pays attention to within the trial. The results show that because gender affects the voir dire process it may also affect how a juror votes, future research should examine whether this link is shown from voir

dire to jury deliberation.

In reference to intersectionality another limitation of this study is the lack of racial diversity within my sample. The potential juror pool was majority white in both Washington and Multnomah county and is a factor of the location of these courts. Washington County is 80.7% white, 2.4% African American, 1.1% American Indian, 10.9% Asian, 0.5% pacific Islander and 16.8% Hispanic (Census.gov, 2018). Multnomah county's racial breakdown is 79.5% white, 6% African American, 1.4% American Indian, 7.9% Asian, 0.7% Pacific Islander, and 11.6% Hispanic (Census.gov, 2018). Even though these counties are a majority white the racial breakdown of the study is still not proportional to the area where it was conducted. My results surrounding race could also be influenced by the overrepresentation of people of color in the criminal justice system and that those with recent felonies are not allowed to serve on the jury in Oregon. People of color are overrepresented in felony convictions and therefore are more likely to be ineligible to serve on a jury trial. For example, the only individual I witnessed be excused from voir dire due to a felony conviction was an African American female. Conducting a study with a more proportionate racial breakdown would enable the researcher to see more of the impacts of *Batson v. Kentucky* and the intersection between gender and race.

Another limitation this research faced was that I was also making assumptions of people's gender and race based on appearance. I had no way of knowing how each individual identified without access to their juror questionnaires or of asking them demographic information. This meant that I was also having to assume gender and race of potential jurors, attorneys, and judges considering their hair, outfits, and if they referenced themselves using pronouns. Future research can combat this limitation by

gaining access to juror questionnaires or by being able to ask all individuals involved demographic information.

Mize and Hannafor-Agor (2008) also discuss judges within voir dire. They examine the American Bar Associations Principles for Juries and Jury Trials. The 11th principle states "Courts should ensure that the process used to empanel jurors effectively serves the goal of assembling a fair and impartial jury" (Mize and Hannafor-Agor, 2008: 2). This principle recommends guidelines for pre-voir dire preparation as well as conducting voir dire to improve information collection. They also discuss a NCSC study of juries and judges that found when attorneys conducted most of the voir dire, questions were more likely to be directed at individual jurors (Mize and Hannafor-Agor, 2008). Mize and Hannafor-Agor (2008) argue that the different goals of judges and attorneys call peremptory strikes into question, especially when considering if their intended use continues to be discriminatory or not. Both of these studies discuss a judge's role in voir dire and how who conducts voir dire may impact what types of questions and behaviors are seen during jury selection. This research did not examine judges but future research could follow from Mize and Hannafor-Agor's (2008) work to better understand how judges would impact voir dire.

Additionally, future research could further confirm the procedural justice theory used in this study by interviewing jurors pre and post voir dire experience and asking them about their experience and their view of the legal system. By interviewing individuals straight after voir dire and intermittingly afterwards the researcher would be able to see any change in view of legitimacy based on their voir dire experience.

Finally, the organizations of voir dices can vary by county and state. Washington and Multnomah county had two very different set ups to the start of the voir dire process but with only one voir dire observed in Multnomah county these differences could not be adequately compared. Beyond that, state-by-state differences were not even considered in this analysis. In future research comparisons across state and county would enable a greater understanding of the impacts of the system as a whole and further examine gender's role in it.

Overall, the information of the salience of gender throughout the voir dire process can be used by attorneys to determine the appropriateness of their presentation style but also to understand how jurors may be viewing the process. This research can also be used by potential jurors to better understand the process they are involved in and how the jury selection process influences the trial as a whole. The experience of potential jurors also plays into procedural justice where their experience impacts their view of the legitimacy of the whole legal system (Tyler, 2003). The importance of the saliency of gender in voir dire is highlighted through procedural justice because it influences the public's view of the legal system as a whole so it has a long-lasting effect far beyond the one or two-day voir dire experience of potential jurors. Gender is present in all aspects of the voir dire process and therefore is important to consider for all those involved in trial to better give defendants a fair trial for defense attorneys and for prosecutors to understand how they are being viewed by jurors.

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Appendix: Coding Sheet

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| Juror Observation: Gender Race Class | |
| Agreements: Approve-Direct Empathy/legitimizing statements Reassure, encourages, or shows optimism Compliment | |
| ASKS: For permission For reassurance For understanding | |
| Attorney/Court Only: Back-Channel Responses Partnership Statements Self-Disclosure Statements | |
| Checks: For understanding | |
| Closed questions: Case specific info Case specific opinion General legal info Personal legal opinion Personal information question Opinion questions | |
| Disapproval: Statements Concern Criticism | |
| Open Questions: Case specific legal info Case specific legal opinion General legal info General legal opinion Personal legal info Personal legal opinion Personal info Personal opinion | |

| | |
|---|--|
| General: Transition words Orient Personal remarks/ social chit chat Laughs/tells jokes Checks for understanding Bid for repetition Orient | |
| Leading questions: Negative Positive | |
| Body language: Approving/disapproving nods Step closer or further away | |

Selected for Jury?

Yes No Not Sure

Struck and by whom?

Struck Judge (cause) Not Struck

